In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 790

ANTHONY MARCELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 285 F. 2d 322.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1960. A petition for rehearing was denied on February 3, 196.. On March 2, 1961, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including March 8, 1961. The petition for a writ of certiorari was filed on March 7, 1961.

QUESTIONS PRESENTED

1. Whether a defendant may be convicted in a federal court on the uncorroborated testimony of an accomplice.

2. Whether the evidence sustained petitioner's conviction, even on the assumption that corroboration of an accomplice's testimony should be required.

3. Whether the punishment imposed upon petitioner constituted a denial of equal protection of the laws.

STATEMENT

Petitioner was indicted in the United States District Court for the Southern District of California on four substantive counts (arising out of two narcotics transactions), and also for conspiracy.[1] He was convicted and given concurrent sentences of twenty years on counts 2 and 3, relating to one transaction, concurrent sentences of twenty years on counts 4 and 5, relating to another transaction, and five years on the conspiracy charge, to be concurrent with the sentence on count 2—making a total sentence of forty years (I-R. 112-113). The court of appeals affirmed.

The pertinent evidence is as follows:

1. Mrs. Marie Santino testified that in the fall of

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[1] Count 1 of the indictment did not apply to petitioner. Count 2 charged receiving and concealing one pound of heroin on or about November 30, 1958. Count 3 charged selling and facilitating the sale of heroin on that date. Count 4 charged receiving and concealing one pound of heroin on or about December 15, 1958. Count 5 charged sale and facilitating the sale of heroin on the same date. Count 6 charged conspiracy (I-R. 2-8).

1958 Quentin Browning, a resident of San Francisco, while visiting at her home in Los Angeles, discussed with her the subject of narcotics (II-R. 7-8). She telephoned petitioner and asked him if he knew where he could buy some, to which petitioner replied that he would find out (II-R. 10-11). Later, petitioner said that he could purchase a kilo of heroin for $14,000 (II-R. 13). Browning said that he could advance $7,000 for a half kilo, whereupon Mrs. Santino and petitioner flew to San Francisco and received that amount of money (II-R. 14-19). They then took a plane to Chicago, where they stayed at the Caffarello Motel near the airport, Mrs. Santino registering on October 21 under the name of Sandino (II-R. 20-22). When petitioner encountered difficulty in obtaining the narcotics in the form requested, Mrs. Santino telephoned Browning. Petitioner made the purchase and brought what he said was heroin back to Los Angeles in his suitcase (II-R. 28-31). There, petitioner turned it over to Mrs. Santino, who delivered it to Browning in San Francisco (II-R. 31-34). The package contained heroin, in a form different from that which Browning had requested, and some cocaine, which Browning had not requested, but accepted with the understanding that it could be returned if he could not dispose of it (II-R. 34-36).

As to this transaction, Browning testified that when the subject of narcotics was discussed at the time of his visit to Mrs. Santino in October, 1958, she said that she knew a man who probably could get some; that she later said narcotics could be had for $7,000 a pound; and that he (Browning) gave her

$7,000. Mrs. Santino telephoned from Chicago to the effect that she could not procure it packaged in the manner he had requested (III-R. 122-126). Two days later, she delivered the heroin to him in San Francisco, which he tested and found to be of acceptable quality (III-R. 127-129).

2. About three weeks later, Mrs. Santino, who had heard from Browning, again made arrangements to get narcotics. She obtained money from Browning. Then, she and petitioner went to Chicago where petitioner left her for a few days (II-R. 36-40). After their return to Los Angeles, petitioner gave her a package which she, accompanied by her husband, delivered to Browning in San Francisco (II-R. 40-42). Browning complained about the quality of the narcotics and told her to return it (II-R. 42-44). She returned the package to petitioner who told her to call Browning (II-R. 44-47). Browning came to Los Angeles and he and petitioner worked out an adjustment (II-R. 48-50).

Browning also testified to his part in this transaction (III-R. 131-137).

Matthew Santino testified that he accompanied his wife to San Francisco to deliver the narcotics on this trip; that Browning was angry about the quality of the narcotics; and that they then brought the narcotics back to Los Angeles (III-R. 191-195).

3. On December 15, 1958, petitioner sent approximately fifteen ounces of heroin by Greyhound bus in a package addressed to "Gladys Whitney." Browning had a friend sign for it (III-R. 139-141). A

Greyhound bus bill dated 12-15-58 bearing a signature of "Gladys Whitney" was admitted in evidence.

4. Following efforts by Browning to get back part of the purchase price which he had advanced for the second Chicago purchase, Browning came to Los Angeles and complained personally. Petitioner drew a pistol and told Browning he didn't want him to cause any trouble. Browning then contacted federal narcotic agents (III-R. 144-150), and turned over to them substances which when analyzed were found to contain low percentages of heroin (II-R. 98-109).

5. Petitioner, testifying in his own behalf, stated that, when he visited with the Santinos in the fall of 1958, the subject of narcotics was brought up but that he advised them "to leave that stuff alone" (III-R. 219). He admitted the two trips to Chicago with Mrs. Santino but said they were at her invitation and that he did not purchase narcotics (III-R. 221-224). He said that, early in the following year (1959), Mrs. Santino and Browning came to his office in Los Angeles and discussed the purchase of restaurant equipment. They then claimed that petitioner owed Browning $7,000 on a 'deal' for heroin. Petitioner said that he did not know what they were talking about and drew a pistol, running them both off his property (III-R. 235-236, 261-262).

ARGUMENT

1. Petitioner concedes (Pet. 12) that the federal rule permits conviction of a defendant upon the uncorroborated testimony of an accomplice, but urges the Court to change the law in this case. The fed-

eral rule has been consistently applied for many years. See, *e.g.*, *Caminetti* v. *United States*, 242 U.S. 470, 495. Even if it were appropriate to make a change, the problem would be preferably one for Congress, or for this Court in the exercise of its rule-making power, not for retrospective adjudication in a particular case.

2. In any event, the question is not presented because there was corroborative evidence. Petitioner directs his attack principally at count 2 of the indictment, relating to the November 30, 1958, transaction. But Mrs. Santino's husband testified that he accompanied her to San Francisco to deliver the heroin which she and petitioner had previously acquired in Chicago. Browning testified as to receiving the narcotics on this occasion, as to their inferior quality, and as to the ensuing contention with petitioner over what should be done to adjust the matter, culminating in the pistol-drawing episode in petitioner's Los Angeles office. Petitioner himself testified to accompanying Mrs. Santino on the trip to Chicago and admitted that he drew a pistol on the occasion when Browning demanded money. Even if the rule in the federal courts were changed as petitioner requests, this testimony would be ample corroboration of Mrs. Santino's evidence.

2. There was no denial of equal protection in the treatment accorded the various members of this conspiracy. Petitioner complains that Browning was never charged, and that Mrs. Santino received a light sentence. But petitioner—who actually obtained the narcotics, threatened violence to

Browning,[2] denied his part in the transaction, and had two previous felony convictions (III-R 239)—was not in the same position as the others. Moreover, Browning was the informer and Mrs. Santino helped reveal the illegal plot. Under the law, the prosecution and the sentencing court had authority to make distinctions in the treatment of the various participants in the conspiracy, and the reasons for these differences need not be spread upon the judicial record. Petitioner's sentence was very severe, but the proper apportionment of punishment among several offenders is not a matter with which this Court can concern itself. *Gore* v. *United States*, 357 U.S. 386, 393.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1961.

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[2] While testifying at the trial, petitioner said (III-R. 239): "Well, I was so mad at that time that I just deliberately went up and got a gun. *And I should have killed both of them*" (emphasis added).

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